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No. 02-1315

IN THE SUPREME COURT OF THE UNITED STATES

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, ET AL.,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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A. The Establishment Clause Does Not Afford The Protection Of Individual Conscience In Religious Matters Required By the Washington Constitution

1. In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488 (1986) (*Witters* II), this Court ruled that Washington did not violate the Establishment Clause when it provided state aid to a student to be used "to support his religious education". However, in *Witters v. Washington Commission for the Blind*, 112 Wash. 2d 363, 369, 771 P.2d 1119, 1121 (1989) (*Witters* III), *cert. denied sub nom. Witters v. Washington Department of Services for the Blind*, 493 U.S. 850 (1989), the Washington Supreme Court ruled that the "state constitution prohibits the use of public moneys to pay for such religious instruction". The difference in these decisions reflects the fact that the Washington Constitution protects individual conscience in religious matters that are not protected by the Establishment Clause.

Article I, section 11 of the Washington Constitution provides that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" Pet. 88a. This provision, which focuses on freedom of conscience through avoiding "compelled support", is different in scope from the separate mandate in the federal constitution to avoid the establishment of religion.

2. There is no question that the aid to the student in *Witters* II was used for religious education. *Agostini v. Felton*, 521 U.S. 203, 225 (1997) ("the grant recipient [in *Witters* II] clearly would use the money to obtain religious education"). Despite this fact, the Court concluded that the program did not violate the Establishment Clause because the neutrally available state aid did not "confer any message of state endorsement of religion". *Witters* II, 474 U.S. at 489. There is no Establishment Clause

violation when "the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government". *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002). Thus, "the circuit between government and religion [is] broken, and the Establishment Clause [is] not implicated". *Id.*

3. In contrast to the Establishment Clause, article I, section 11 protects individual rights of conscience by prohibiting the use of tax dollars for certain religious purposes. This concern for individual conscience lies at the heart of the Washington Constitution and is a concept that dates from the earliest days of the republic to modern times. It was expressed in a comment to a draft constitution placed before Washington's 1889 constitutional delegates:

> "The right to worship according to one's own conscience has been recognized as an absolute and fundamental possession of every man, from before the foundation of the republic; the right not to worship at all, *nor contribute to the support of religion, is now considered to rest upon equally firm foundations.*" W. Lair Hill, *Washington: A Constitution Adapted To The Coming State; Outline And Comment On Leading Features Submitted For Examination*, The Oregonian, July 4, 1889, at 9 (emphasis added).

This view was echoed in 1975 when Washington voters defeated a proposed constitutional amendment to authorize such assistance as would be permitted by the United States Constitution for students of all educational institutions, including those with religious affiliation or influence.[1] Arguments against the amendment expressed concern that "all taxpayers could be forced to subsidize

[1] Official Voters Pamphlet 14-15, 28 (1975) (House Joint Resolution 19).

specific religious teachings regardless of their own belief".[2]

Over the course of centuries states have adopted[3] and reaffirmed[4] such policies against compelled support for religious activities, rooted in the view in the Virginia Bill of Religious Freedom that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical". Va. Code Ann. § 57-1.

4. Thus, in *Witters* III, the court concluded that intervening private choice did not change the fact that compulsory tax payments were used to finance religious instruction. *Witters* III, 112 Wash. 2d at 370, 771 P. 2d at 1121. Other states have reached the same conclusion that intervening private choice does not break the circuit between tax dollars and support of religion.[5]

5. Indeed, in other contexts, this Court has rejected the notion that private choice breaks the circuit

[2] *Id.* at 15.

[3] *See, e.g.*, Pennsylvania Const. of 1776, art. II ("And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent[.]"); Indiana Const. of 1851, art. 1, § 4 ("[N]o man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.").

[4] *See, e.g., Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079, at *2 (Fla. Cir. Ct. 2002): "While the 1968 Constitutional Revision Commission proposal for Article I, § 3 removed the prohibition of governmental aid to religious institutions (a provision extant since the 1885 Constitution), the Florida Legislature took action to retain and to strengthen the restriction and its applicability to 'indirect' aid."

[5] *California Teachers Ass'n v. Riles*, 29 Cal. 3d 794, 632 P.2d 953, 960-64, 176 Cal. Rpt. 300 (1981); *Dickman v. Sch. Dist. 62C*, 232 Or. 238, 366 P.2d 533, 539-42 (1961), *cert. denied sub nom. Carlson v. Dickman*, 371 U.S. 823 (1962); *Fannin v. Williams*, 655 S.W.2d 480, 483-84 (Ky. 1983); *Bd. of Educ. For Indep. Sch. Dist. 52 v. Antone*, 384 P.2d 911 (Okla. 1963).

between tax dollars and an unconstitutional application of the funds. In *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court struck down a state law that provided textbooks to all students, even those attending segregated schools. The private choice of the student to attend a public school or a segregated private school did not break the circuit between the state assistance and the discriminatory schools. *Id.* at 464-65 ("When [a] necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination.").

In *Norwood*, educational assistance to students attending a school that practiced race discrimination was not viewed the same as a government employee spending a private paycheck for segregated school tuition. The fact that there was independent choice did not change the public character of the funds. Similarly, the use of public funds to pay for religious instruction does not change the public character of the funds or satisfy Washington's constitutional protection of freedom of conscience through avoiding compelled support of religious instruction.

6. Protecting freedom of conscience from compelled support is an important value that this Court has recognized in other contexts. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (agency-shop dues of nonunion public employees could not be used to support political and ideological causes that were not germane to collective bargaining activities); *Keller v. State Bar of California*, 496 U.S. 1 (1990) (state bar may not use members' compulsory dues to fund activities of an ideological nature that were not related to regulation of the legal profession and improving legal services). These decisions trace the interest in avoiding required support for such beliefs to the writings of Madison and Jefferson in defense of religious liberty. "This view has long been

held", the Court in *Abood* noted, citing Madison's writings and Thomas Jefferson's view, that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical". *Abood*, 431 U.S. at 234-35 n.31 (quoting 2 The Writings of James Madison 186 (Hunt ed. 1901); I. Brant, *James Madison: The Nationalist* 354 (1948)).[6]

B. Washington Is Not Required To Subsidize Davey's Pursuit Of A Theology Degree

1. In the opening brief we explained that this case is governed by the principle that the legislative decision not to subsidize the exercise of a fundamental right does not infringe that right. Pet'r Br. 22-25. Davey's amici argue that this principle is limited to government speech and practices, like abortion, that the government may choose to discourage.[7] This Court has put no such limit on the funding principle. Rather, this principle encompasses a wide range of policy objectives, including policies that address the appropriate source of funds for activities that are not themselves disfavored. For example, in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), the Court ruled that there was no right to tax exempt status for an organization engaged in constitutionally protected lobbying activities. *Regan* did

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[6] The fact that Washington's heightened protection of individual conscience is not required by the federal constitution does not mean such interests must be disregarded. Such interests cannot overcome the need to maintain the integrity of a public forum by allowing expression of viewpoints (*Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995)) and do not give rise to a federal free speech right to decline to pay fees that support government facilitation of wide ranging public discourse. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000). But these cases do not stand for the proposition that these interests are not significant and do not otherwise limit Washington's ability to recognize these interests through their political processes.

[7] *See, e.g.*, Brief Of Amici Curiae State Of Texas, et al., at 19-21 (government speech); Brief Amici Curiae Of The Council For Christian Colleges & Universities, et al., at 23-26 (abortion).

not involve government speech and there is nothing in the decision to suggest that Congress was trying to discourage the practice of lobbying. According to the Court, Congress simply "chose not to subsidize lobbying as extensively as it chose to subsidize other activities that non profit organizations undertake to promote the public welfare". *Regan*, 461 U.S. at 544. Here, the scholarship funding is based on the state constitutional policy of protecting individual rights of conscience by prohibiting compelled support of religious instruction and worship.

2.(a) This argument also assumes that the Washington Constitution is hostile toward religion. There is no basis for this assumption. Article I, section 11 traces back to the Virginia Bill of Religious Freedom. *Supra* p. 3. In fact, the guarantee of religious freedom embodied in article I, section 11 "extends broader protection than the first amendment of the federal constitution". *First Covenant Church v. City of Seattle*, 120 Wash. 2d 203, 229-30, 840 P.2d 174, 189 (1992); Pet'r Br. 31-32.

(b) Davey and his amici argue that article I, section 11 is hostile to religion because they claim it arose out of anti-Catholic bigotry related to the Blaine Amendment. Resp't Br. 20 n.8.[8] Whatever anti-Catholic prejudice may have existed in other states, that is not the constitutional history in Washington. Nothing in the history of the adoption of article I, section 11 suggests that it was the product of anti-Catholic prejudice.[9] Moreover, the suggestion by some amici that the purpose of the constitution was to permit Protestant worship in public schools while denying the same funding to "sectarian" schools is false.[10]

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[8] *See, e.g.*, Brief Amici Curiae Of Common Good Legal Defense Fund, et al., at 7-13.

[9] *See* Brief Of Amicus Curiae Of Historians And Law Scholars On Behalf Of Petitions Gary Locke, et al. at 26-30.

[10] Some amici suggest that rejection of a proposal to include in article IX, section 4 an explicit prohibition on religious exercises in public schools is evidence that religious neutrality was not the framers' intent. Brief of Amici Curiae State of Texas, et al., at 28. Yet a contemporaneous report of the constitutional convention is to the contrary, indicating a delegate "wanted to add a clause that no religious exercises or instruction shall be permitted therein. This was not objected to except upon the score of being unnecessary." Spokane Falls Review, Aug. 11, 1889, p. 2, col. 6.

In 1891, two years after the constitution was adopted, the Washington Attorney General interpreted article I, section 11 to prohibit all Bible reading and religious exercise in public schools. According to the Attorney General, the terms "religion" and "religious" as used in article I, section 11 "apply to all forms of religion and religious worship and belief". 1 Op. Att'y Gen. 142, 145 (1891). In particular, the Attorney General concluded that the King James version of the Bible could not be read in public schools because it was "a sectarian book". *Id.* at 150. In 1918, the Washington Supreme Court cited this opinion with approval when it ruled that article I, section 11 prohibited all Bible study—including Protestant, Catholic, or Jewish Bibles—in the public schools. *Washington ex rel. Dearle v. Frazier*, 102 Wash. 369, 173 P. 35 (1918). Thus, there is no basis for the claim that article I, section 11 was an anti-Catholic ruse to preserve the Protestant religion in the public schools.

3. Davey also argues that *Regan* and the other funding cases do not apply because *Sherbert v. Verner*, 374 U.S. 398 (1963), and *McDaniel v. Paty*, 435 U.S. 618 (1978), prohibit a classification based on religion. Resp't Br. 13, 22. This argument is not well taken. In both cases individuals were denied a secular benefit because of their religious practice. In *Sherbert*, the individual would have to work on Saturday in violation of her religion to receive unemployment compensation. In *McDaniel*, the individual would have to give up being a minister in order to be a delegate to the state constitutional convention. Neither case turned on religious classification. Unlike *Sherbert* and *McDaniel*, Davey's ineligibility for the

scholarship was not because of his religious practice. He acknowledges that his religious beliefs and practice would not have disqualified him if he had majored in business. JA 116. Davey was only ineligible because he wanted to take a course of study that was beyond the scope of the scholarship program.

4.(a) Both *Sherbert* and *McDaniel* are examples of unconstitutional conditions being imposed on the recipient of benefits. *Harris v. McRae*, 448 U.S. 297 (1980), distinguished *Sherbert* on this basis. In *Harris*, the Court concluded that the Hyde Amendment, which prohibited using Medicaid dollars to fund abortions, did not impinge on the constitutionally protected freedom of choice recognized in *Roe v. Wade*, 410 U.S. 113 (1973). According to *Harris*, the Court in *Sherbert* held that the state could not "withhold *all* unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath". *Harris*, 448 U.S. at 317 n.19. In contrast, *Harris* concluded that the Hyde Amendment "does not provide for such a broad disqualification from receipt of public benefits". *Id.* Instead, the Hyde Amendment "represents simply a refusal to subsidize certain protected conduct. A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *Id.* The same is true of the scholarship—Washington only refuses to subsidize Davey's theology degree. It did not impose a broader disqualification. Davey could have pursued his theology degree halftime at Northwest College and used his scholarship to get his business degree halftime at another college.

(b) Davey does not dispute the fact that he could have pursued his theology degree at Northwest and used his scholarship at another school. Instead, he argues that requiring him to attend another school imposes an unconstitutional condition upon him because his decision

to attend Northwest was based on his religious conviction. But this is no different than the situation in *Harris* and *Maher v. Roe*, 432 U.S. 464 (1977). In both cases, the women wanted the state to pay for them to exercise their constitutional right to terminate their pregnancies. They had the same constitutional right to have an abortion as Davey has to attend Northwest and pursue a theology degree. The fact that the government would not pay for their abortions did not violate their constitutional rights. As the Court observed in *Maher*, "[t]he Connecticut regulation places no obstacles absolute or otherwise in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires." *Maher*, 432 U.S. at 474. Similarly, Davey suffers no state-imposed disadvantage as a consequence of Washington's decision to not subsidize his theology degree.

(c) Davey's argument that "[t]he state's only recourse is to deny that the restrictions *in fact* require a scholarship recipient to forego pursuit of a theology major" (Resp't Br. 23) also misses the mark. The critical point is that the state did not require Davey to discontinue his pursuit of a theology degree, an ineligible activity under the program, in order to receive funding for eligible activities. The fact that he may forego the state funding because he finds practical problems in pursuing eligible activities concurrently with his pursuit of ineligible activities does not convert the funding limitations to an unconstitutional condition. In *Maher*, the government offered Medicaid funding to cover the medical expenses associated with childbirth but not the costs of an abortion. The fact that a woman could not avail herself of the funding program and the constitutional right to an abortion at the same time did not convert the funding parameters of the program to an

"unconstitutional condition", so long as the ineligibility did not extend beyond the refusal to fund the particular activity.

(d) Davey's amici suggest that the scholarship imposes an unconstitutional condition because the scholarship cannot be used to pay for the secular courses that Davey will take at Northwest.[11] But Davey is in an integrated degree program. Nothing in this record suggests that he pays some tuition for his theology courses and some for his secular courses. The state is under no obligation to segregate out different parts of Davey's course selection.

C. The Scholarship Does Not Violate the Free Exercise Clause

1. In our opening brief we explained that the eligibility requirement in the Promise Scholarship does not violate Davey's right to freely exercise his religion. Pet'r Br. 36-39. Thus, unlike the ordinance at issue in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the requirement does not prohibit or regulate Davey's practice of his religion. Unlike *Sherbert* and *McDaniel*, the scholarship does not impose an unconstitutional condition on Davey. *Supra* pp. 8-9.

2. Davey and his amici argue that the scholarship discriminates against religion on its face and is, therefore, subject to strict scrutiny. They make essentially two arguments. First, they seem to argue that any law that refers to religion is facially discriminatory.[12] Here, article I, section 11 provides: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" Pet. 88a. Wash. Rev. Code § 28B.10.814 prohibits using aid for "pursuing a degree in theology". Pet. 92a.

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[11] *See, e.g.*, Brief of Amicus Curiae Theresa Becker, at 7-10.

[12] *See, e.g.*, Brief of Amici Curiae State of Texas, et al., at 9-11.

(a) This mechanistic approach, applying strict scrutiny whenever a law refers to religion, completely bypasses the central question—whether the object or purpose of the law is to suppress religious beliefs or practices. But ascertaining whether this object or purpose is present is the very reason for examining the text of the law. *Lukumi*, 508 U.S. at 533. *Lukumi* does not stand for the proposition that any express mention of religion in the text of a law constitutes facial discrimination that automatically triggers strict scrutiny. Express distinctions on the basis of religion are contained in a number of laws,[13] and any of these laws—if viewed as isolated texts —could be viewed as favoring or disfavoring individuals on the basis of religion. If these distinctions gave rise to "automatic" strict scrutiny, this Court's reference in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 890 (1990), to state statutes that contain a "nondiscriminatory religious-practice exemption" would be a *non sequitur*. This is not the rule.

(b) Indeed, applying strict scrutiny in the automatic fashion suggested by Davey would disregard the historic role of the states in preserving freedom of conscience in matters of religion. If state laws that make distinctions based on religion were automatically catapulted into strict scrutiny, the state law context and broader approach would never be given consideration. But this broader context deserves consideration. The Religion

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[13] *See, e.g.*, Wash. Rev. Code § 16.50.150 (religious ritual slaughter of animals exempt from certain requirements for humane slaughter of livestock); Wash. Rev. Code § 18.22.230 (exempting certain medical treatments from licensing when treatment by prayer or spiritual means in accordance with religious tenets); Wash. Rev. Code § 28A.320.140 (school dress codes may not preclude students from wearing clothing in observance of their religion); Wash. Rev. Code § 66.44.270 (law against supplying liquor to a person under the age of twenty-one does not apply when such liquor is minimal amount necessary for a religious service).

Clauses of the First Amendment did not apply to the states until 1940. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Prior to that time, state constitutions provided the only protection for religious liberty at the state level. Thus, in *Dearle*, 102 Wash. 369, 173 P. 35, the Washington Supreme Court applied article I, section 11 to prohibit Bible reading in public schools 45 years before this Court applied the Establishment Clause to prohibit the same practice. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

In other contexts, this Court has "take[n] into account the interests of state and local authorities in managing their own affairs" with special consideration "where States historically have been sovereign". *Missouri v. Jenkins*, 515 U.S. 70, 113 (1995) (O'Connor, J., concurring) (quoting *Milliken v. Bradley*, 433 U.S. 267, 281 (1977)); *United States v. Lopez*, 514 U.S. 549 (1995). As in these areas, the states' sovereignty and historical traditions should not now be minimized by a peremptory application of strict scrutiny whenever state laws call for distinctive treatment. State laws should be considered in the context of the state's overall approach to freedom of conscience in matters of religion, and strict scrutiny should not be applied simply because religion is mentioned in the text of a state law.

3. Davey and his amici also argue that the scholarship discriminates on its face because they claim it only prohibits teaching theology from a religious point of view. Resp't Br. 19.[14] In Davey's view, teaching comparative religion in public colleges and universities constitutes teaching theology from the secular point of view. Thus, Davey claims viewpoint discrimination as if public universities taught Protestant theology but the state would not permit scholarships to teach Catholic theology.

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[14] *See, e.g.*, Brief of Amicus Curiae Fairness Foundation, at 17-19.

Davey's comparison is mistaken. Theology and comparative religion do not represent different viewpoints about the same subject. Theology is the study of the nature of God and religious truth. It is designed to inculcate belief (or disbelief) in God. A degree in theology prepares students for positions of religious leadership. There is no dispute that this was the degree Davey was seeking. *See* note 17 *infra* p. 17. In contrast, courses involving religious ideas in public colleges and universities in Washington are studied as an aspect of the general intellectual and cultural history of societies and civilizations. JA 84. Thus, the Comparative Religion Department at the University of Washington is in the Jackson School of International Studies. JA 83. One proof that theology and comparative religion are not the same subject is the fact that the Establishment Clause does not prohibit "teaching about religion, as distinguished from the teaching of religion, in the public schools". *Abington Township*, 374 U.S. at 306 (Goldberg, J., concurring). Similarly, article I, section 11 does not prohibit teaching about religion in the public schools. *Calvary Bible Presbyterian Church v. Bd. of Regents of Univ. of Wash.*, 72 Wash. 2d 912, 919, 436 P.2d 189, 193 (1967), *cert. denied*, 393 U.S. 960 (1968). If teaching comparative religion was the equivalent of teaching Protestant or Catholic theology, both of these decisions would be wrong. In fact, theology and comparative religion are two separate subjects—not different viewpoints about the same subject.

4.(a) Even if theology and comparative religion are considered to be the same subject, the Promise Scholarship does not discriminate against religion. As we explained in our opening brief, it is permissible to draw a distinction between secular and religious instruction. Pet'r Br. 39-44. Davey argues that this line is not permissible because it overlooks the distinction between government speech endorsing religion, which the

Establishment Clause prohibits, and private speech endorsing religion, which the Free Exercise Clause protects. Resp't Br. 37. Davey's distinction makes no sense. When the government gives aid to private religious schools—that are engaging in private speech—the aid must be secular. *Mitchell v. Helms*, 530 U.S. 793 (2000). And this secular aid may not be diverted to religious instruction. *Id.* at 840 (O'Connor, J., concurring in the judgment); *id.* at 890 (Souter, J., dissenting). Thus, the distinction between secular and religious instruction is not limited to government speech.

(b) In contrast to Davey, the United States acknowledges the line between secular and religious instruction. U.S. Amicus Br. 16. However, the government argues that the distinction does not apply where the line is directed at a religious practice based on its motivation. The government misunderstands the eligibility requirement in the scholarship. It is not based on a student's motivation. The state does not inquire or know why a student is pursuing a degree in theology. And even the Ninth Circuit majority acknowledged that the scholarship "neither prohibits religious conduct nor does its application turn on the student's religious motivation". Pet. 14a. Davey also recognizes that the eligibility requirement does not turn on the student's motivation. He correctly points out that "confirmed atheists . . . are nevertheless barred by Washington's restriction from majoring in theology". Resp't Br. 31.[15]

(c) The United States also argues that the line between secular and religious instruction applies only in the context of the Establishment Clause. U.S. Amicus Br. 16-17. But there is no logical reason this neutral line is not equally valid in other contexts. Avoiding the

[15] The government's argument that Washington's law lacks general applicability is similarly flawed. U.S. Amicus Br. 17. The restriction against using the scholarship to pursue a degree in theology is not based on the student's motivation.

establishment of a state-sponsored church is, unquestionably, an important interest. However, avoiding establishment is not the only important interest that can be furthered by an awareness of religion's existence in distributing public funds. Declining to apply government funds to religious enterprises can also serve the undeniably important interest of avoiding compelled support of religious ideas with which taxpayers may disagree, and the line this Court has recognized between secular and religious instruction furthers this important state goal.

Moreover, the "play in the joints" this Court recognized in *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), acknowledged that the essential goal of protecting religious liberty is not amenable to simple and categorical solutions. *Cf. Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (resolution of cases at difficult intersection of government neutrality and non-funding not susceptible to categorical platitudes). Nothing in the Court's recognition of the need for play in the joints to avoid establishment suggests that such play is not also called for to protect other important concerns necessary to protect religious liberty.

5. Davey argues at length that the Promise Scholarship does not withstand strict scrutiny. Resp't Br. 24-33. As an initial matter, these arguments are not well taken because the scholarship is a neutral law of general applicability that is not subject to strict scrutiny. Davey also overstates the case of strict scrutiny.

(a) At the outset Davey cites *Widmar v. Vincent*, 454 U.S. 263 (1981), for the proposition that avoiding government funding of religious instruction to comply with a state constitution can never be a compelling interest. Resp't Br. 26-27. Yet this is clearly not the holding of *Widmar*. The Court was careful to "limit our holding to the case before us". *Widmar*, 454 U.S. at 276. The Court found it was "unnecessary for us to decide

whether, under the Supremacy Clause, a state interest, derived from its own constitution, could ever outweigh free speech interests protected by the First Amendment". *Widmar*, 454 U.S. at 275-76 (footnote omitted). Here, the importance of state constitutions in protecting religious liberty (*supra* pp. 11-12) and the long history of protection of individual conscience by prohibiting compelled support (*supra* pp. 2-3) constitute a compelling state interest.

(b) Davey argues that the eligibility requirement in the Promise Scholarship is not narrowly tailored because it is both under and over inclusive. Resp't Br. 30-32. He argues that the requirement is underinclusive because it only applies to those seeking a degree in theology and not to non-theology majors who take a theology class.[16] His position appears to be that this test requires a state to fund all instruction that has religious components or fund none. However, he does not explain how failure to include all courses with religious components gives rise to the primary concern addressed by an "underinclusive" inquiry—i.e., whether the statute is serving the state's asserted interest or is a pretext for other interests, as in *Lukumi*, 508 U.S. at 544-45

[16] This argument is directed at Wash. Rev. Code § 28B.10.814, which prohibits using state aid to pursue a degree in theology. Pet. 92a. It does not implicate the broader language of article I, section 11. In *Witters* III, the Washington Supreme Court ruled that article I, section 11 prohibits funding a degree for training a pastor. In adopting Wash. Rev. Code § 28B.10.814, the Legislature applied this constitutional line. However, it has not been decided whether the Washington Constitution would permit non-theology majors to use state aid to take theology classes. In *Washington ex rel. Gallwey v. Grimm*, 146 Wash. 2d 445, 468, 48 P.3d 274, 285 (2000), the majority distinguished *Witters* III and upheld a student aid program because it contained a "religious *exclusion* which provides that no student will be enrolled in any program that includes religious worship, exercise, or instruction". The dissent disagreed stating that "religious instruction in preparation for the ministry[ ] is not all that our state constitution forbids". *Id.* at 492, 48 P.3d at 297. The Washington Supreme Court has yet to consider whether article I, section 11 forbids aid for students taking theology classes who are not training for the ministry.

(ordinance claimed to protect public health and prevent cruelty to animals is underinclusive for those ends when it failed to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than the religious sacrifice). In *Witters* III, the Washington Supreme Court focused on religious training for the ministry. Theology degree programs are commonly understood to be programs whose students are preparing for positions of religious leadership.[17] Applying public funds to such preparation is near the core of the concern that a taxpayer not be "put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree" (*Witters* III, 112 Wash. 2d at 365, 771 P.2d at 1120), thus compelling a person to "furnish contributions of money for the propagation of opinions which he disbelieves". Va. Code Ann. § 57-1.

(c) Davey also argues that Wash. Rev. Code § 28B.10.814 is overinclusive because it would apply to individuals who seek a degree in theology but never intend to pursue a career in the ministry. Resp't Br. 31. This argument ignores the fact that the use of public funds for religious instruction itself is objectionable. The state has no control over how the training will be used.

[17] *See, e.g.*, The Association of Theological Schools, *Fact Book on Theological Education 2002-2003*, at http://www.ats.edu/data/factbook (visited Oct. 13, 2003). This is the express purpose of the Northwest College Pastoral Ministries degree: "The Pastoral Ministries major is designed to prepare students for vocational ministry as a pastor in the local church. The core courses should enable the student to develop and express biblical concepts of the church and pastoral ministry and acquire skills needed to engage in effective pastoral ministry." http://www.nwcollege.edu/catalog/programs/pasminmaj.html (visited Oct. 13, 2003).

D. The Scholarship Does Not Violate The Free Speech Clause

In our opening brief, we explained that the Promise Scholarship does not violate the Free Speech Clause because it does not establish a forum. Pet'r Br. 44-47. In response, Davey argues that a program that facilitates a broad spectrum of educational activity is a forum. This argument ignores the purpose of a forum, which is to encourage a diversity of views from private speakers. The purpose of the Promise Scholarship is not to facilitate diversity of views from students or teachers. It is to provide education. The argument made by Davey was rejected in *United States v. American Library Association*, 123 S. Ct. 2297, 2305 (2003) (plurality opinion) ("public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak"); Pet'r Br. 46-47. Since the Promise Scholarship does not establish a forum, it does not violate the Free Speech Clause for Washington to adhere to the neutral line between secular and religious instruction. *Supra* pp. 13-15.[18]

E. The Scholarship Does Not Violate The Establishment Clause Or The Equal Protection Clause

Although the Court of Appeals did not reach these issues and they were not raised in Davey's Brief In Opposition, Davey argues that the Promise Scholarship

[18] Davey also argues that he was ineligible to receive the scholarship because he engaged in the speech of declaring his major in pastoral studies. Davey misunderstands the eligibility requirement. Wash. Rev. Code § 28B.10.814 provides that aid may not be used to pursue a theology degree. Eligibility is not based on the declaration of a major. Lana Walters, the financial aid administrator at Northwest College, explained to students that they should not accept the scholarship if they are pursuing a degree in theology—even if they do not initially declare a theology major. JA 156-59.

violates the Establishment Clause and the Equal Protection Clause of the Fourteenth Amendment. Neither of these arguments are well taken.

Davey claims that the state's refusal to pay for a degree in theology demonstrates a hostility toward religion that violates the Establishment Clause. Resp't Br. 42. However, as we have explained, refusal to use state funds to pay for religious instruction does not evidence hostility toward religion. *Supra* pp. 6-7. Davey also argues that determining what constitutes a degree in theology will result in excessive entanglements between church and state. Resp't Br. 42-43. There is no basis for this claim. The Court has "always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). In this case, it is up to the school the student is attending to determine, as the one with the best knowledge of its curriculum, whether the student is pursuing a degree in theology. JA 126, 131, 137. The Higher Education Coordinating (HEC) Board does not make this determination. JA 128-30. Although the HEC Board is ultimately responsible for granting the scholarship, there is no evidence in this record that private religious colleges are trying to evade the limitation on scholarships. Indeed, the record in this case is that the financial aid administrator at Northwest College is scrupulous about following the requirements of the program. JA 156-59. Nor is there any evidence that excessive monitoring by the HEC Board is creating an excessive entanglement. There is simply no basis for Davey's claim.

With regard to the Equal Protection Clause, Davey argues that the eligibility requirement in the Promise Scholarship affects a fundamental right and is subject to strict scrutiny. Resp't Br. 44. This Court rejected exactly the same argument in *Maher*, 432 U.S. at 471-74, *Harris*, 448 U.S. at 316-18, and *Regan*, 461 U.S. at 548-51. These

decisions stand for the proposition that the "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny". *Regan*, 461 U.S. at 549. Accordingly, the Court "declined to apply strict scrutiny and rejected equal protection challenges" in those cases. *Id.* Similarly, in this case, Davey does not have a constitutional right to have the state subsidize his constitutional right to pursue a theology degree.

Although Davey argues that the Promise Scholarship cannot withstand strict scrutiny, he does not seriously argue that the state's decision not to pay for religious instruction to train the clergy is without a rational basis. As this Court observed in *Norwood v. Harrison*, 413 U.S. 455, 462 (1973), even if a state provided state aid to nonsectarian schools like textbooks, it "*could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance*". (Emphasis added.) There is no basis for Davey's Equal Protection claim.

F. Conclusion

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted.

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